No. 49026-9

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

VERNON L. CURRY, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S REPLY BRIEF

Sean M. Downs
Attorney for Appellant

GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

A. ARGUMENT

1. The Court erred in not granting the Defendant's Motion to Dismiss for Prosecutorial Misconduct and/or Mismanagement for Interfering with Mr. Curry's Choice of Counsel.

The record on review is not incomplete regarding Mr. Clower's motion for withdrawal as counsel. Both parties indicated to the trial court that the record was silent regarding the reasons for his withdrawal at the time of the withdrawal and that there was no motion hearing on the merits that took place previously. RP 28-29. The record is properly before this court in the form of the report of proceedings from the motion hearing on April 25, 2016 and from the clerk's papers which include Mr. Clower's declaration. CP 150-151.

The denial of Mr. Curry's right to counsel is a structural error under the Sixth Amendment. *United States v. Gonzalez–Lopez*, 548 U.S. 140, 146, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). Requiring a showing of specific prejudice and showing the effects of the error for an issue such as this are simply too hard to measure. *Chapman v. California*, 386 U. S. 18, 24 (1967). Likewise, some errors always result in fundamental unfairness, for example, when an indigent defendant is denied an attorney. *See Gideon v. Wainwright*, 372 U. S. 335, 343–345 (1963).

In the instant case, a showing of specific prejudice would be impossible to speculate on unless there was an ineffective assistance of counsel claim. The denial of Mr. Curry's right to counsel was a structural error necessitating dismissal. In the alternative, reversal of the convictions and remand for a new trial would be the appropriate remedy for the court not considering an intermediate remedy of imposition of a special prosecutor, per the Respondent's suggestion.

2. The Court abused its discretion by not granting a mistrial when Detective Katz provided opinion testimony that Mr. Campbell and Mr. Henderson were not involved in the shooting of Mr. Ward.

The questions posited by the State in its questioning of Det. Katz specifically elicited an opinion on the issue of who shot Mr. Ward. Det. Katz testified that only one person of the three who shot a firearm that night was involved in the killing of Mr. Ward. RP 1238. He specifically eliminated Mr. Campbell and Mr. Henderson as being involved in the killing. RP 1238. As a general rule, witnesses are to state facts and not to express inferences or opinions. *State v. Haga*, 8 Wn. App. 481, 491, 507 P.2d 159 (1973). Even the inference as to an opinion on guilt is inadmissible. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

Respondent argues that Mr. Campbell and Mr. Henderson were exculpatory for Mr. Curry in their testimony. However, they would be

even more exculpatory if Det. Katz was not allowed to give opinions that neither of them shot Mr. Ward. The inference of an opinion on guilt in the instant case prejudiced Mr. Curry as previously argued. Accordingly, the convictions must be reversed and the case remanded for a new trial.

3. The Court erred by allowing improper impeachment of Mr. Curry about gang activity or Y Gang Entertainment.

Mr. Curry is not required to request or accept a limiting instruction regarding impeachment of Mr. Curry when the court committed error about admission of the underlying evidence. The court mistakenly believed that Mr. Curry had denied involvement with Y Gang, when in fact he was only questioned about YG Entertainment and Young Gangster Entertainment. RP 1623. The underlying error would not be obviated simply because of a limiting instruction being given to the jury. *Cf. State v. Ramirez*, 62 Wn. App. 301, 305-06, 814 P.2d 227 (1991). As was pointed out by defense counsel, the State's proposed limiting instruction would in essence indicate that Mr. Curry was a gang member and evidence of Y Gang was being used to impeach Mr. Curry's statements to the contrary. RP 1687.

The court abused its discretion in allowing supposed impeachment evidence when the court was simply mistaken about what was actually testified to. The court also abused its discretion in allowing impeachment

evidence regarding a collateral matter. This improper evidence prejudiced Mr. Curry in that the jury was allowed to view Mr. Curry as supposedly involved in gang culture. Accordingly, Mr. Curry's convictions must be reversed and the case remanded for a new trial.

4. **The State committed prosecutorial misconduct in its closing argument.**

Appellant relies on previous briefing regarding this issue.

5. **The Court erred in refusing to instruct the jury that they could consider first degree manslaughter as a lesser included offense to the charge of first degree murder.**

The factual prong of the *Workman* test as applied in this case supports an inference that only the lesser included offense of Manslaughter in the First Degree may have been committed. Respondent argues that the wearing of a mask and gloves and firing seven shots into a vehicle can only evince an intent to kill. However, a person can commit the physical act of aiming and firing a firearm into a vehicle and nevertheless not have the intent to kill an occupant of said vehicle. Firing into a vehicle could be intended to be a scare tactic. Not wanting to get caught in the act of shooting by wearing a mask and gloves does not necessarily mean that an intent to kill was present.

Respondent references *State v. Guilliot*, 106 Wn. App. 355, 368-69, 22 P.3d 1266 (2001) for the proposition that a manslaughter

instruction would not have been reached because the jury did not return a verdict of guilty under the lesser included offense of Murder in the Second Degree, therefore it would be harmless error. However, this is not a general rule of application and is examined on a case by case basis given the factual scenario of each case. *See, e.g.*, *State v. Hansen*, 46 Wn. App. 292, 296, 730 P.2d 706 (1986) (an error in failing to instruct on a lesser included offense does not require reversal if the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions). In the instant case, both Murder in the First Degree and Murder in the Second Degree require the intent to kill. The jury was never given the opportunity to consider whether recklessness without the intent to kill applied.

Here, the evidence would permit the jury to rationally find the defendant guilty of the lesser offense and acquit him of the greater offense. Accordingly, Mr. Curry's conviction for Murder in the First Degree must be reversed and remanded for a new trial.

B. CONCLUSION

Given the foregoing, Appellant respectfully requests that this court reverse his convictions and remand for entry of an order of dismissal, or in the alternative, for an order for new trial.

DATED this July 7, 2017

Respectfully submitted,

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Pierce County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on July 7, 2017 to email address PCpatcecf@co.pierce.wa.us. Service was made by email pursuant to the Respondent's consent. I also served Appellant, Vernon Curry, a true and correct copy of the document to which this certification is affixed via first class mail postage prepaid to Washington State Penitentiary 1313 North 13th Avenue Walla Walla, WA 99362.

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

GRECCO DOWNS, PLLC

July 17, 2017 - 3:58 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49026-9
Appellate Court Case Title:	State of Washington, Respondent v. Vernon L. Curry, Jr., Appellant
Superior Court Case Number:	14-1-03668-1

The following documents have been uploaded:

- 4-490269_Briefs_20170717155815D2969281_5122.pdf
  This File Contains:
  Briefs - Petitioners Reply
  The Original File Name was Curry Appellant Reply Brief.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us
- jruyf@co.pierce.wa.us

Comments:

Sender Name: Sean Downs - Email: sean@greccodowns.com
Address:
500 W 8TH ST STE 55
VANCOUVER, WA, 98660-3085
Phone: 855-309-4529 - Extension 2

Note: The Filing Id is 20170717155815D2969281